

The 2000 Election of the President

Siegel v. LePore (Donald M. Middlebrooks, S.D. Fla. 9:00-cv-9009) and *Touchston v. McDermott* (John Antoon II, M.D. Fla. 6:00-cv-1510)

Among the litigation over who won the presidential contest in Florida in 2000 were two emergency actions filed in two of Florida's three districts seeking federal-court intervention in manual recounts. Both judges denied the plaintiffs immediate relief, and the court of appeals affirmed those decisions en banc. Reviewing a decision by the state's supreme court, however, the U.S. Supreme Court determined that the manual recount procedures violated equal protection.

Subject: Recounts. *Topics:* Recounts; matters for state courts; intervention; equal protection; military ballots; absentee ballots; election errors; voting technology; enjoining certification; Electoral College; voter identification.

At 9:50 a.m. on Saturday, November 11, 2000, at a time of uncertainty about the outcome of the 2000 presidential election in Florida and which presidential candidate would therefore receive a majority of Electoral College votes, George W. Bush, Dick Cheney, and seven voters filed a federal complaint in the Southern District of Florida seeking federal-court intervention in manual recounts that opponents had sought in four counties: Palm Beach, Miami-Dade, Broward, and Volusia.¹ With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.² On November 12, television news media sought permission to televise proceedings.³

Judge Donald M. Middlebrooks set the case for hearing on Monday.⁴ He heard cases in both Miami and West Palm Beach at the time; he decided to hear this case in Miami because the courthouse there could accommodate

1. Complaint, *Siegel v. LePore*, No. 9:00-cv-9009 (S.D. Fla. Nov. 11, 2000), D.E. 1; *Siegel v. LePore*, 234 F.3d 1163, 1169 (11th Cir. 2000); see David Firestone & Michael Cooper, *Bush Sues to Halt Hand Recount in Florida*, N.Y. Times, Nov. 12, 2000, at 1; Charles Lane, *Bush Seeks Federal Role in Matter of State Statute*, Wash. Post, Nov. 12, 2000, at A21; Martin Merzer & Caroline J. Keough, *Bush Goes to Court*, Miami Herald, Nov. 12, 2000, at 1A; Jay Weaver & Gail Epstein Nieves, *GOP Suit Given Low Chance*, Miami Herald, Nov. 12, 2000, at 24A. See generally Abner Greene, *Understanding the 2000 Election* 70–82 (2001).

2. Motion, *Siegel*, No. 9:00-cv-9009 (S.D. Fla. Nov. 11, 2000), D.E. 2.

3. Media Motion, *id.* (Nov. 12, 2000), D.E. 11; see Order, *id.* (Nov. 12, 2000), D.E. 18 (granting intervention).

4. Order, *id.* (Nov. 12, 2000), D.E. 16; Minutes, *id.* (Nov. 13, 2000), D.E. 40; *Siegel*, 234 F.3d at 1169; see David S. Broder, *Both Sides Increase Legal Wrangling as Florida Begins Slow Hand Recount*, Wash. Post, Nov. 12, 2000, at A1; David Kidwell & Tyler Bridges, *Judge to Hear Testimony on Ballot Woes*, Miami Herald, Nov. 13, 2000, at 13A; Stephen Labaton, N.Y. Times, Nov. 13, 2000, at 18; Martin Merzer, *Federal Judge Enters Dispute Today*, Miami Herald, Nov. 13, 2000, at 1A; Merzer & Keough, *supra* note 1.

Tim Reagan interviewed Judge Middlebrooks for this report by telephone on May 31, 2016.

more visitors.⁵ Because of advances in electronic filing, paperwork in emergency litigation is much easier to handle now than it was then, and the court of appeals was asking for copies of the record while Judge Middlebrooks was considering the case.⁶

On the day of the hearing, Judge Middlebrooks denied the plaintiffs immediate relief.⁷

Under the Constitution of the United States, the responsibility for selection of electors for the office of President rests primarily with the people of Florida, its election officials and, if necessary, its courts. The procedures employed by Florida appear to be neutral and, while not yet complete, the process seems to be unfolding as it has on other occasions.⁸

Relying on clear Eleventh Circuit authority, Judge Middlebrooks also denied the media's motion to televise proceedings.⁹ The clerk's office and the marshals service responded to the considerable interest in the case so that Judge Middlebrooks did not have to worry about it.¹⁰

At 3:15 p.m., "just hours after" Judge Middlebrooks issued his decision, three Broward County voters filed a similar action in the Middle District of Florida.¹¹ With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.¹² Judge John Antoon II set the case for hearing at 2:00 p.m. on the following day.¹³ Judge Antoon's chambers worked late into the night to resolve the motion.¹⁴

On November 17, Judge Antoon agreed with Judge Middlebrooks.¹⁵ "In summary, Plaintiffs have failed to set forth a valid basis for intervention by federal courts. They have not alleged that the Florida law is discriminatory, that citizens are being deprived of the right to vote, or that there has been

5. Interview with Hon. Donald M. Middlebrooks, May 31, 2016.

6. *Id.*

7. Siegel v. LePore, 120 F. Supp. 2d 1041 (S.D. Fla. 2000); see Charles Lane & Serge Kovaleski, *Bush Legal Fight Faces Uncertain Future*, Wash. Post, Nov. 14, 2000, at A21; Martin Merzer, *State Sets Deadline*, Miami Herald, Nov. 14, 2000, at 1A; Todd S. Purdum & David Firestone, *A Vote Deadline in Florida Is Set for Today*, N.Y. Times, Nov. 14, 2000, at A1; Evan Sack, *Saying He Doesn't Expect to Be Final Arbiter, Judge Won't Stop Hand Recount*, N.Y. Times, Nov. 14, 2000, at A21; Jay Weaver, *Court Rejects Bid by GOP to Block Hand Tally of Votes*, Miami Herald, Nov. 14, 2000, at 1A; Jay Weaver, *Thorny Questions*, Miami Herald, Nov. 16, 2000, at 19A.

8. Siegel, 120 F. Supp. 2d at 1044.

9. Media Order, Siegel, No. 9:00-cv-9009 (S.D. Fla. Nov. 13, 2000), D.E. 34.

10. Interview with Hon. Donald M. Middlebrooks, May 31, 2016.

11. Complaint, Touchston v. McDermott, No. 6:00-cv-1510 (M.D. Fla. Nov. 13, 2000), D.E. 1; Touchston v. McDermott, 120 F. Supp. 2d 1055, 1056 (S.D. Fla. 2000); see Order, Touchston, No. 6:00-cv-1510 (M.D. Fla. Nov. 15, 2000), D.E. 20 (denying a motion to transfer the case to Judge Middlebrooks).

12. Motion, Touchston, No. 6:00-cv-1510 (M.D. Fla. Nov. 13, 2000), D.E. 3.

13. Touchston, 120 F. Supp. 2d at 1056 n.1.

Tim Reagan interviewed Judge Antoon for this report by telephone on October 30, 2012.

14. Interview with Hon. John Antoon II, Oct. 30, 2012.

15. Touchston, 120 F. Supp. 2d at 1058.

fraudulent interference with the vote.”¹⁶ The court of appeals and Judge An-
toon denied the plaintiffs in both cases an injunction pending appeal.¹⁷

On November 21, Florida’s supreme court resolved ambiguities in Flor-
ida’s election statutes and overruled a ruling by Florida’s secretary of state that
manual recounts must have been certified by November 14, setting November
26 as a deadline that would allow sufficient time for contests.¹⁸ The U.S. Su-
preme Court vacated this decision on December 4 and remanded the case for
clarification of whether the state supreme court (1) was violating the U.S. Con-
stitution by depriving Florida’s legislature of plenary authority over the elec-
tion of presidential electors when the state supreme court construed Florida’s
election statutes so as to promote a right to vote deemed both fundamental
and supported by Florida’s constitution and (2) by construing statutes after
the election, was denying Florida a safe harbor provided by 3 U.S.C. § 5, which
provides that a determination of an election controversy will be immune to
attack in Congress if timely made pursuant to procedures established before
the election.¹⁹

By a vote of eight to four sitting en banc, the court of appeals affirmed, on
December 6, both district judges’ decisions not to interfere with the manual
recounts.²⁰

On Friday, December 8, Florida’s supreme court decided an appeal arising
from a contest filed by Albert Gore, Jr., and Joseph I. Lieberman and, by a vote
of four to three, remanded the “cause for the circuit court to immediately tab-
ulate by hand the approximate 9000 Miami-Dade ballots, which the counting
machine registered as non-votes, but which have never been manually re-
viewed, and for other relief that may thereafter appear appropriate.”²¹ The

16. *Id.* at 1059.

17. Siegel v. LePore, 234 F.3d 1162 (11th Cir. 2000); Touchston v. McDermott, 234 F.3d
1130 (11th Cir. 2000); Order, *Touchston*, No. 6:00-cv-1510 (M.D. Fla. Nov. 15, 2000), D.E. 19.

18. Palm Beach Cty. Canvassing Bd. v. Harris, 772 So. 2d 1220, 1240 (Fla. 2000); see Dan
Balz & Peter Slevin, *Fla. Justices Say Vote Totals Must Include Hand Recounts*, Wash. Post,
Nov. 22, 2000, at A1; Dana Canedy, *Democrats Praise Ruling, and the Count Continues*, Nov.
22, 2000, at A23; William Glaberson, *Ruling Is Seen as Affirming Primacy of Will of Voters*,
N.Y. Times, Nov. 22, at A24; Linda Greenhouse, *Decision Hews to Lines of Gore Team’s Posi-
tion*, N.Y. Times, Nov. 22, 2000, at A1; Martin Merzer & Lesley Clark, *Justices: Keep Counting*,
Miami Herald, Nov. 22, 2000, at 1A.

19. Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70 (2000); see U.S. Const. art. II, § 1,
cl. 2; Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 1004 (2000) (adding a question on 3
U.S.C. § 5 to the grant of certiorari); see also Frank Davies, *U.S. Supreme Court Justices Ask
Florida Court for Clarification*, Miami Herald, Dec. 5, 2000, at 17A; Linda Greenhouse, *U.S.
Justices Agree on Need to Clarify Case*, N.Y. Times, Dec. 5, 2000, at A1; Charles Lane, *Justices
Return Case to Fla.*, Wash. Post, Dec. 5, 2000, at A1.

20. Siegel v. LePore, 234 F.3d 1163 (11th Cir. 2000); Touchston v. McDermott, 234 F.3d
1133 (11th Cir. 2000), *cert denied*, 531 U.S. 1061 (2001); see Charles Babington, *Little-Noticed
Court Decision Held Political Promise for Gore*, Wash. Post, Dec. 11, 2000, at A11; *GOP Claim
Delayed*, Miami Herald, Nov. 28, 2000, at 15A; Kevin Sack, *Appeals Court Gives Gore Victory,
Rejecting Bush Request to Bar Manual Recounts*, N.Y. Times, Dec. 7, 2000, at A35.

21. Gore v. Harris, 772 So. 2d 1243, 1262 (Fla. 2000); see Dan Balz, *Fla. Supreme Court*

state supreme court also invited the state circuit court to order manual recounts in other counties as necessary.²² The U.S. Supreme Court stayed this decision on the following day and set the case for hearing on Monday.²³

On the day of oral argument in the U.S. Supreme Court, Florida's supreme court issued an opinion on a six-to-one vote resolving the December 4 remand from the U.S. Supreme Court.²⁴ With respect to 3 U.S.C. § 5, the November 26 date was not a new deadline: "It was simply a date in accordance with the requirements that had been established prior to the election and in order to construe all the provisions of the Code as a consistent whole."²⁵ With respect to legislative control over presidential elections, the Florida court applied the tools of judicial interpretation: "Hence, based upon our perception of legislative intent, we have ruled that election returns must be accepted for filing unless it can clearly be determined that the late filing would prevent an election contest or the consideration of Florida's vote in a presidential election."²⁶

On the following day, the U.S. Supreme Court decided on a five-to-four vote that the contemplated county-by-county manual recounts in Florida hopelessly violated the Equal Protection Clause in the U.S. Constitution.²⁷

Federal courts in Florida received other actions concerning the presidential election of 2000.²⁸

A Palm Beach County voter filed a federal complaint in the Southern District of Florida on November 8, the day after the election, seeking a new vote for President in Palm Beach County because of the misleading design of the butterfly ballot: the candidate listed first—Bush—corresponded with the first

Orders Partial Recount Across State, Wash. Post, Dec. 9, 2000, at A1; Linda Greenhouse, *Spotlight Again Shifts to Justices in Washington*, N.Y. Times, Dec. 9, 2000, at A1; George Lardner, Jr., *Lawyers Eye Fla. Court's Surprising 4-3 Decision*, Wash. Post, Dec. 10, 2000, at A31; Martin Merzer & Lesley Clark, *New Hope for Gore*, Miami Herald, Dec. 9, 2000, at 1A.

22. *Gore*, 772 So. 2d at 1262.

23. *Bush v. Gore*, 531 U.S. 1046 (2000); see *Bush Loses Appeal*, Miami Herald, Dec. 7, 2000, at 31A; Dan Balz, *Divided U.S. Supreme Court Orders Freeze on Fla. Count*, Wash. Post, Dec. 10, 2000, at A1; Linda Greenhouse, *The Court Ruling: Bush Had Sought Stay*, N.Y. Times, Dec. 10, 2000, at 1; Martin Merzer, *Supreme Court Halts Recount*, Miami Herald, Dec. 10, 2000, at 1A; Alan Sipress & Ellen Nakashima, *A Scramble, Interrupted; Order to Stop Stuns Fla. Officials Rushing to Recount*, Wash. Post, Dec. 10, 2000, at A1.

24. *Palm Beach Cty. Canvassing Bd. v. Harris*, 772 So. 2d 1273 (Fla. 2000); see Daniel de Vise, *Justices Defend Their Decision in Favor of Late Hand Recounts*, Miami Herald, Dec. 12, 2000, at 27A; David Firestone, *Top State Court Rewrites Opinion in Bush Case*, N.Y. Times, Dec. 12, 2000, at A26.

25. *Palm Beach Cty. Canvassing Bd.*, 772 So. 2d at 1290.

26. *Id.* at 1291.

27. *Bush v. Gore*, 531 U.S. 98, 103 (2000); see *Gore v. Harris*, 773 So. 2d 524 (Fla. 2000) ("pursuant to the direction of the United States Supreme Court, we hold appellants can be afforded no relief"); see Dan Balz & Charles Lane, *Court Overturns Recounts, Giving Bush the Presidency*, Wash. Post, Dec. 13, 2000, at A1; Richard L. Berke, *By Single Vote, Justices End Recount, Blocking Gore After 5-Week Struggle*, N.Y. Times, Dec. 13, 2000, at A1; Martin Merzer, *Defeat for Gore: Recount Order Violates Constitution, Justices Say*, Miami Herald, Dec. 13, 2000, at 1A.

28. See Notice of Related Actions, *Touchston v. McDermott*, No. 6:00-cv-1510 (M.D. Fla. Dec. 1, 2000), D.E. 33.

hole to punch, but the candidate listed second on the left—Gore—corresponded with the third hole to punch, the second hole going to the candidate listed first on the right—Pat Buchanan.²⁹ At a November 9 hearing, the plaintiff voluntarily dismissed the case.³⁰

On November 9, a voter filed a federal complaint in the Southern District challenging the winner-take-all allocation of Florida’s electoral votes.³¹ On November 14, Judge William P. Dimitrouleas denied the plaintiff immediate relief.³²

Also on November 9, a voter filed a federal complaint in the Northern District alleging that he was wrongfully denied the vote for failure to show photo identification.³³ Judge Robert L. Hinkle denied the plaintiff immediate relief that same day.³⁴

In his papers in support of the request for a temporary restraining order, Mr. Dickens has produced no evidence that any requirement to produce photographic identification was applied differently to persons of different races. . . . He has made no showing that any requirement to produce photographic identification impacted the result of the Florida election.³⁵

Northern District Judge Lacey A. Collier ruled on December 8 that absentee ballots from overseas and military voters should be counted even if election officials did not have records of their being requested.³⁶

29. Complaint, *Miller v. Harris*, No. 9:00-cv-9004 (S.D. Fla. Nov. 8, 2000, filed Nov. 9, 2000), D.E. 1; see Emergency Motion for Injunctive Relief, *id.* (Nov. 8, 2000, filed Nov. 9, 2000), D.E. 2; see also Edward B. Goley, *Ballot Battles 279* (2016) (“Even Buchanan acknowledged, both then and subsequently, that Gore would have been president but for the butterfly ballot.”).

30. Order, *Miller*, No. 9:00-cv-9004 (S.D. Fla. Nov. 9, 2000, filed Nov. 13, 2000), D.E. 7; Minutes, *id.* (Nov. 9, 2000, filed Nov. 13, 2000), D.E. 6.

31. Complaint, *May v. Harris*, No. 0:00-cv-7671 (S.D. Fla. Nov. 9, 2000, filed Nov. 13, 2000), D.E. 1; see Preliminary-Injunction Motion, *id.* (Nov. 9, 2000, filed Nov. 13, 2000), D.E. 2; see also Elinor J. Brecher, *Suit Seeks to Challenge “Winner-Take-All” System*, *Miami Herald*, Nov. 14, 2000, at 23A.

32. Opinion, *May*, No. 0:00-cv-7671 (S.D. Fla. Nov. 14, 2000, filed Nov. 15, 2000), D.E. 5; see Order, *id.* (Jan. 22, 2001), D.E. 11 (granting a voluntary dismissal); see Weaver, *Thorny Questions*, *supra* note 7.

Before briefing an appeal, the plaintiff unsuccessfully sought certiorari in the Supreme Court, and then the appeal was dismissed for lack of prosecution. *May v. Harris*, 531 U.S. 1119 (2001); Dismissal, *May v. Sec’y of the State of Fla.*, No. 00-16015 (11th Cir. Feb. 14, 2001).

33. Complaint, *Dickens v. Florida*, No. 4:00-cv-420 (N.D. Fla. Nov. 9, 2000), D.E. 1; see Motion, *id.* (Nov. 9, 2000), D.E. 4.

34. Opinion, *id.* (Nov. 9, 2000), D.E. 6 [hereinafter *Dickens Photo-Identification Opinion*]; see Steve Bousquet & Lesley Clark, *And Still Counting*, *Miami Herald*, Nov. 10, 2000, at 1A.

35. *Dickens Photo-Identification Opinion*, *supra* note 34, at 2; see Order, *Dickens*, No. 4:00-cv-420 (N.D. Fla. Nov. 16, 2000), D.E. 9 (approving a voluntary dismissal).

36. *Bush v. Hillsborough Cty. Canvassing Bd.*, 123 F. Supp. 2d 1305 (N.D. Fla. 2000); see Complaint, *Bush v. Hillsborough Cty. Canvassing Bd.*, No. 3:00-cv-533 (N.D. Fla. Nov. 26, 2000), D.E. 1; see also Michael Cooper & Richard Pérez-Peña, *In a Shadow, Other Cases Go On*, *N.Y. Times*, Dec. 12, 2000, at A26; *Overseas Ballots: U.S. Judge to Hear Case in GOP Bid to Gain Votes*, *Miami Herald*, Dec. 5, 2000, at 22A; Robert Timothy Reagan, *Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act 15* (Federal Judicial Center 2016).

On December 21, Southern District Judge Alan S. Gold dismissed a settled November 27 action seeking alternatives to the pending certification of Bush as the victor in Florida.³⁷ A November 28 Southern District action seeking to have machine-rejected ballots hand counted in Miami-Dade County was dismissed because the plaintiff's attorney did not identify a member of the court's bar to support his pro hac vice motion.³⁸

On January 3, 2001, Judge Middlebrooks granted a voluntary dismissal of his Southern District case.³⁹ On February 23, plaintiffs in Judge Antoon's Middle District case filed an amended complaint seeking future curtailment of manual recounts.⁴⁰ Judge Antoon granted a stipulated dismissal on June 19.⁴¹

37. Order, *Williams v. Harris*, No. 0:00-cv-7735 (S.D. Fla. Dec. 21, 2000, filed Dec. 27, 2000), D.E. 9; *see* Complaint, *id.* (Nov. 27, 2000), D.E. 1.

38. Order, *Citizens for a Fair & Honest Election*, No. 1:00-cv-4515 (S.D. Fla. Dec. 28, 2000, filed Jan. 2, 2001), D.E. 21; Order, *id.* (Dec. 7, 2000), D.E. 14; Report and Recommendation, *id.* (Dec. 6, 2000, filed Dec. 7, 2000), D.E. 12; Complaint, *id.* (Nov. 28, 2000, filed Nov. 29, 2000), D.E. 1; *see* *GOP Claim Delayed*, *supra* note 20.

39. Order, *Siegel v. LePore*, No. 9:00-cv-9009 (S.D. Fla. Jan. 3, 2001, filed Jan. 8, 2001), D.E. 77.

40. Amended Complaint, *Touchston v. McDermott*, No. 6:00-cv-1510 (M.D. Fla. Feb. 23, 2001), D.E. 75.

41. Order, *id.* (June 19, 2001), D.E. 112.